

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

JOSEPH P. & SHEILA M. NAILOR

Case No. 03-16408

Debtor(s)

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION

Presently before the court is the motion of Joseph P. Nailor and Sheila M. Nailor (“Debtors”) to convert their chapter 7 case to one under chapter 13. Opposition has been filed by the USR Group, Inc. (“USR”). The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a),

157(b)(1), 157(b)(2)(A) and 1334(b).

FACTS

Based upon the pleadings submitted, the court finds the following:

- 1) The Debtors filed a joint chapter 7 petition on September 25, 2003.
- 2) On Schedule A, the Debtors list a one family residence located at 16 Brower Avenue, Saratoga Springs, New York (the “Residence”) valued at \$165,000.
- 3) On Schedule D, the Debtors list Dovenmuehle Mortgage and Key Bank as holding mortgages against the Residence in the amounts of \$48,704 and \$73,223, respectively.
- 4) The Debtors received their discharge on January 7, 2004.
- 5) On or about April 29, 2004, USR made an offer to purchase the Trustee’s interest in the Residence.
- 6) On May 26, 2004, the Trustee filed a motion to sell the estate’s interest in the Residence based on USR’s offer.
- 7) On June 22, 2004, the Debtors filed opposition to the Trustee’s motion, and on July 2, 2004, the Debtors filed a supplemental affidavit in further support of their opposition.
- 8) On July 15, 2004, the Debtors filed the within motion to convert their case to chapter 13.

ISSUE

The primary issue before the court is whether the issuance of a chapter 7 discharge prevents the Debtors from converting their case to chapter 13. Secondary concerns are the ability of the Debtors, if any, to waive their discharge and the standing, if any, of USR to object to the conversion.¹

ARGUMENTS

¹ The Debtors raise a general question of standing with little or no discussion, argument, or law to support their position.

Relying upon *In re Markakis* [sic], 254 B.R. 77 (Bankr. E.D.N.Y. 2000), *In re Lesniak*, 208 B.R. 902 (Bankr. N.D. Ill. 1997), and *In re Schwartz*, 178 B.R. 340, 344 (Bankr. E.D.N.Y. 1995), USR objects to the conversion of the Debtors' case because "a debtor is prohibited from converting his case from chapter 7 to chapter 13 once he has received a discharge." (Opp'n to Debtors' Mot. to Convert at 11). In addition, USR asserts that there is no statutory basis for the Debtors to vacate their discharge.

The Debtors argue that they are merely attempting to retain ownership of their home, are not acting in bad faith, and have the ability to pay into a chapter 13. The Debtors also maintain that the issuance of their discharge does not preclude conversion and can be vacated if necessary. Additionally, the Debtors argue that USR has no standing to contest their conversion.²

DISCUSSION

The court recently issued a broad decision on conversion of a chapter 7 case to chapter 13 pursuant to § 706(a) and the substantive and procedural issues attendant therewith. In *In re Carrow*, Case No. 02-17838 (September 8, 2004),³ this court looked to the express language of § 706(a) and held that a debtor has the right to convert at any time as long as (1) the debtor's case was not previously converted, and (2) the debtor is eligible for chapter 13. 11 U.S.C. § 706(a), (d). The court also addressed the specific issue raised in this case: whether the issuance of a chapter 7 discharge poses an impediment to a conversion to chapter 13. This court found nothing in the Bankruptcy Code prohibiting a discharged chapter 7 debtor from converting to chapter 13 or requiring as a condition to conversion that the discharge be vacated. As

² See *supra* note 1.

³ The court assumes familiarity with the *Carrow* decision.

discussed in *Carrow*, the *Marcakis* and *Lesniak* genre of cases provide virtually no statutory analysis and the only authority raised is citation to other cases with the same lack of analysis. The court finds the reasoning contained in *In re Mosby*, 244 B.R. 79 (Bankr. E.D.Va. 2000), far more persuasive. As discussed in *Carrow*, if a discharged debtor is to be prevented from converting to another chapter, it is within the province of Congress to do so as it specifically did in § 1112(d)(2).⁴

No issues were raised regarding a prior conversion by the Debtors or their eligibility for chapter 13 pursuant to § 109. Thus, the court finds no impediments to conversion of the Debtors' case to one under chapter 13. Since the court does not find the Debtors' chapter 7 discharge an obstacle to the conversion, it need not address the ability, if any, of a debtor to vacate a chapter 7 discharge.⁵

CONCLUSION

Based on the foregoing, the case is converted to one under chapter 13, and a chapter 13 trustee shall be appointed. The Debtors' counsel shall submit an order in conformance with *Carrow* and this decision.

Dated: September 9, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge

⁴ Section 1112(d)(2) prohibits conversion from chapter 11 to chapters 12 or 13 if the debtor has already received a chapter 11 discharge.

⁵ Because the court concludes that the Debtors may convert their case, it declines to address and leaves for another day whether USR has standing to object to a debtor's motion to convert.